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IN THE

Supreme Court of the United States

October Term 1965

No. 340

ANTHONY R. FERNICOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Anthony R. Fernicola, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 13, 1966 which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey of April 9, 1965, filed April 14, 1965.

Citations to Opinion Below

The opinion of the Court of Appeals printed in Appendix B hereto, infra, has not as yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Were not the principals laid down in Holland v. United States, 348 U.S. 121 (1954), violated where, in a net worth income tax prosecution, (a) petitioner was credited with no cash on hand at the starting point despite undisputed proof of his expenditure of a large amount of cash at that time, (b) where a defense "lead" was disallowed despite overwhelming evidence that it had not been adequately investigated, and (c) where the government summary introduced in evidence failed to credit petitioner with any money earned from his profession during the critical pre-indictment years?

2. Was not petitioner's right to be free of adverse inferences on his failure to testify violated where government counsel, in summation, made reference to the fact that petitioner's wife did not take the stand, and indirect references to petitioner's failure to testify?

3. Did not the Government's summation deny petitioner a fair trial where it made numerous references to personal belief in the falsity of crucial defense evidence, where it charged defendant counsel with manufacturing this evidence and suborning perjury, and made numerous references to the failure of petitioner and his wife to testify?

Statute Involved

The statutory provision involved is 26 U.S.C. Section 7201. It is printed in Appendix A, infra.

Statement

On April 4, 1962, the petitioner, Dr. Anthony R. Fernicola, was indicted by the Grand Jury in and for the District of New Jersey on three counts of violating Section 7201 of the Internal Revenue Code; income tax evasion. Each count represented one year of the years ending December 31, 1955, 1956 and 1957 (1a-2 to 5).* The government tried this case upon the net worth and cash expenditure method of proof by introducing testimony and documents in evidence with respect to the petitioner's net worth from December 31, 1950 through December 31, 1957. The government also offered proof of the petitioner's non-deductible expenditures during the period referred to above. All of the evidence, both testimonial and documentary, was summarized on a schedule which was entered in evidence as G-90 (500a-513a).

In order to establish the petitioner's net worth at the beginning of the first indictment year, the government chose December 31, 1950 as its point and place of beginning and attempted to establish petitioner's net worth at that time and then work forward to the first indictment year. The government selected 1950 as a starting point because petitioner commenced his practice of medicine on August 18 of that year, and, according to the government, had no earning history prior to that time (74a).

As of December 31, 1950 the government

* "a" refers to the appellant's appendix in the Circuit Court of Appeals, which Appendix has been certified and filed with this petition as a part of the official record below.

attributed a net worth of $12,459.19 to the petitioner made up of the following assets: Balance in checking account $74.35; office furniture and equipment $11,022.68; automobile $2,000; less depreciation. The proofs showed, however, that in August 1950 petitioner spent $11,000 in cash to open his office and purchased an automible for $2,000. Yet, despite these substantial cash expenditures petitioner was credited with zero cash on hand at the starting point (109a-111a, Exh. G-90). The government's chief witness admitted that he knew nothing of petitioner's assets prior to August 1950 (109a). He also stated, consequently, that he did not know the source of the funds used to furnish the office and purchase the automobile (116a-117a, 194a-197a).

To account for his alleged net worth increases during 1955, 1956 and 1957 petitioner's representatives furnished the government with explanations or "leads" on four occasions prior to trial. Three times the government was advised that petitioner had received cash gifts from his father, the third time, over a month before trial, specifying a cash hoard of $81,000 delivered to petitioner after his father's death (320a-323a). The government disallowed the claimed $81,000 on the grounds that it had not been declared on the father's State Inheritance Tax return and, further, that the elder Fernicola did not possess sufficient wealth to accumulate such a hoard (134a-138a). In this connection the government's chief witness, an internal revenue service agent, stated that he did not know how the elder Fernicola earned his living from 1930 to the date of his death in 1953 (313a); that he did not know where the father lived from 1947 to 1953 (313a); that he never contacted any of the mortgagors who had borrowed from the father

(151a-162a); that he did not know where petitioner received $13,000 to open his medical practice in 1950 (194a); that, though he knew petitioner attended a private preparatory school, Georgetown University, Georgetown Medical School, and the University of Pennsylvania for graduate work, and served an internship and residency in Newark, all between 1937 and 1950, and knew that the father supported him during that time, he never visited any of these schools to determine the amounts of tuition and how they were paid or how petitioner lived during these years (102a-109a); that he only examined property records as to the elder Fernicola's holdings from 1930 onwards, though the father was already 64 years old in 1930 (313a); that, having knowledge of the father's reputation as a money lender and bail bondsman, he never checked into these facts (95a-96a); and that during the years 1937 and 1953, when the father was claimed to be inactive (134a), his savings accounts increased by $25,000 (144a-145a). Resting on these facts the government contended that it had negatived the "lead" of $81,000.

The government summarized its proof in an exhibit which became G-90 in evidence (256a-257a). In making its computations concerning petitioner's net worth on this summary the government failed to make any allowance for petitioner's income earned and reported during the period August 1950 to December 31, 1954, less his cash expenditures during that period in order to determine additional cash on hand derived from his practice of medicine (229a). The government's own chief witness acknowledged the error of his summary (202a-229a).

Though petitioner's wife was not a defendant

in this case, her name was on each of the joint returns which formed the basis of the indictments. Neither she nor petitioner took the stand in his defense. Despite this, the Assistant United States Attorney in his summation, made continual reference, both direct and indirect to the failure of petitioner and his wife to testify. In the guise of commenting upon the absence of a certain entry in the petitioner's tax return for 1954 the government counsel five times used the phrase "Dr. Fernicola doesn't say so" (438a, 439a, 440a, 442a-443a), though on all but one occasion the tax return was not even mentioned. In addition, there were three direct and explicit comments concerning the failure of petitioner's wife to testify (451a-453a-454a). Defense counsel was continually challenged to "put Mrs. Fernicola on that stand." Government counsel also referred to the fact that "the defense is not obligated to put in any case at all" or "to explain anything" (455a-456a). Reference was also made to the fact that certain testimony was uncorroborated, though only petitioner could have made this corroboration (474a). Further in the summation, defense counsel was accused of "contriving" the defense of a cash hoard. This was not an attack on the evidence but directly on defense counsel, by name (471a, 473a, 491a). The heart of the comment was as follows:

> "Mr. Querques comes into the case in September of this year. The case is put down for trial. He gets a copy of the indictment, and any trial lawyer reading that indictment is going to see from the indictment that the magic number is seventy-five

thousand dollars. Any lawyer taking this case to trial has got to come up with seventy-five thousand dollars of a cash hoard prior to that first tax year, to beat the case, so the quest goes on for seventy-five thousand dollars of non-taxable income, non-taxable funds to explain the discrepancy, to explain away all these cash expenditures..." (471a).

"Isn't this a last-ditch stand? Isn't this a defense contrived for trial--and yes--I'll use the term, Isn't this manufactured evidence?" (473a).

Since there was direct testimony presented as to the existence of this cash hoard (374a-375a), these comments amounted to an accusation that defense counsel had suborned perjury. In addition, the Assistant United States Attorney continually made reference to his personal belief in the falsity of crucial defense evidence, during his summation (445a, 446a, 447a, 448a, 491a). Typical of these was the comment: "Well, if you disbelieve the tin box of Gerardo Fernicola, as I do, -- I don't believe that it ever existed -- (474a)." All of these various objections to the summation were brought to the Court's attention at the time (443a-444a, 492a-494a).

Reasons for Granting the Writ

1. Except for the per curiam opinion in Massei v. United States, 355 U.S. 595 (1958), this Court has not examined a net worth income tax case since the guiding principles were laid down in Holland v. United States, 348 U.S. 121 (1954). This case indicates that the Government has not

heeded the Court's warning to exercise "great care and restraint" in such a prosecution. In its attempt to establish an opening net worth, the government did not credit the petitioner with any cash on hand, in the form of currency. Though petitioner had no earning history prior to the date selected as the point of beginning and had filed no tax returns prior to that year, it was undisputed that he disbursed approximately $13,000 in cash to open his medical office and to purchase a car at the starting point in 1950. The government agent here admitted that he did not know the source of this $13,000 in cash, and, in fact, knew nothing of petitioner's assets prior to the starting point. Here the government's own evidence refuted the zero cash on hand attributed to petitioner in attempting to establish with "reasonable certainty" the opening net worth, as required by Holland v. United States, supra. Furthermore, the record clearly indicated a failure to adequately investigate the validity of a "lead" given to the government by petitioner in explanation of his apparent net worth increases. In Holland v. United States, supra, this Court merely stated that such leads may be considered as true when the government "fails to show an investigation" into their validity. 348 U.S. at 136. Petitioner's case indicates that further guidance is required in determining the extent to which the government must go in making such an investigation. In this case the government disallowed a lead, pertaining to an $81,000 cash hoard left to petitioner by his father, on the ostensible ground that the father could not have amassed such wealth. Though the government indicated an awareness of facts which might have shown such wealth, it admittedly did not pursue them to a conclusion. Petitioner does not question that an

investigation was made, but urges that Holland required more and, failing that, the lead should have been deemed true. In addition, the gross error in the government's summary, in failing to account for petitioner's earnings in the pre-indictment years and thus failing to correctly state his net worth at the beginning of the year 1955, was particularly prejudicial in the light of this court's stricture in Holland, supra, at 128, that "bare figures have a way of acquiring an existence of their own." By sanctioning the procedure followed here the Third Circuit brings itself into seeming opposition with the Second Circuit on this question of the prejudicial nature of such summaries when they are shown to contain errors. United States v. Altruda, 224 F.2d 935 (2 Cir. 1955). Petitioner's case indicates that Holland did not eliminate all the problems in the net worth income tax prosecution and that clarification of the guidelines set out in that case are now required after twelve years of silence in this area of major concern to both the government and the individual taxpayer.

2. In his summation the Assistant United States Attorney violated petitioner's right to be free of comment on his failure to testify. The comments involved here were of an indirect nature involving ostensible references to statements made on petitioner's tax returns and direct comments concerning the failure of petitioner's wife, whose name appeared on all the tax returns involved, and who was not a defendant, to take the stand. These numerous references to the fact that, "Dr. Fernicola doesn't say so" and the direct challenges to put the petitioner's wife on the stand were part of a well-conceived plan to violate petitioner's Fifth Amendment privilege. Though the prohibition

against direct comment has been well established since Wilson v. United States, 149 U.S. 60 (1892) and reiterated recently in Griffin v. California, 380 U.S. 609 (1965), courts continue to be troubled by varieties of indirect comment on the failure of an accused to testify, of which this case presents an extreme example. Both lower federal courts and state courts need guidance on the extent to which this constitutional principle should be applied. In addition to the type of remarks cited above, government counsel also commented that the defense "was not obligated to put in any case at all" and "are not obligated to explain anything," and made further reference to the uncorroborated nature of certain testimony which only petitioner could have substantiated. In totality these series of remarks robbed the petitioner of a valuable constitutional right. To say that such a contention is "without merit" as did the court below, without discussion, is to indicate a lack of compliance with, or understanding of, this court's mandate, and calls for rectification, both for justice's sake and for the guidance of every court in our country.

3. In addition to the above comments, government counsel in his summation directly accused defense counsel, by name, of suborning perjury and at least six times asserted his personal belief in the falsity of certain crucial defense contentions. Even when taken individually, but especially when considered collectively, these comments were grossly unfair and prejudicial to the petitioner's case at a time when he was powerless to meet them, and denied him a fair trial. Combined with the indirect violations of petitioner's right to be free of adverse inferences on his failure to testify, discussed above, this summation constituted conduct every bit as gross as that condemned in

Berger v. United States, 295 U.S. 78 (1935) and United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1939). Not within the last two decades has this court touched on the obligation of government counsel to refrain from striking foul blows. Berger v. United States, supra, at 88. To pass off these contentions as "without merit" is to completely ignore the commanding position of the government's representative at trial and to utterly fail to comprehend this court's pronouncements in the above cited cases. Other circuit courts have seen clearly reversible error in this type of conduct. See e.g. Agueci v. United States, 310 F.2d 817 (2 Cir. 1962), cert. denied, 372 U.S. 959; Wagner v. United States, 263 F.2d 877 (5 Cir. 1959); Greenberg v. United States, 280 F.2d 472 (1 Cir. 1960). The defense here was based on a contention of a prior cash hoard in a metal box delivered to petitioner by an uncle after his father's death. Government counsel's remarks concerning the manufacturing of this evidence by defense counsel and his expressions of personal disbelief in the existence of this cash hoard thus went to the most crucial aspect of the case. The remarks were intended to have a damaging effect and surely they did. For this court to sanction such conduct, as did the court below, is to invite a lowering of the high standards set many years ago in Berger v. United States, supra.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Appendix A—
Statutory and Constitutional Provisions Involved

Federal Statutes

26 U.S.C. Section 7201. Attempt to evade or defeat tax.

Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B—

Opinion of the United States Court of Appeals for the Third Circuit

(Filed June 13, 1966)

PER CURIAM:

Following a jury trial, defendant was found guilty on a three-count Indictment charging him with "wilfully and knowingly attempting to evade and defeat a large part of the income tax owing by him and his wife" for the years 1955, 1956 and 1957, and "filing and causing to be filed...a false and fraudulent joint income tax return" for the years stated.

Since the Government was unable to obtain from the defendant books or records of his medical practice reflecting payments of fees to him, it arrived at its calculations of the defendant's taxable income for the years involved via the "net worth" method and prosecuted its case at the trial in accordance therewith. Holland v. United States, 348 U.S. 121 (1954); United States v. Pepe, F.2d (3 Cir. 1966), decided May 12, 1966.

The hard core of the appellant's contention on this appeal is that the Government failed to satisfactorily prove a substantial understatement of income during the tax years in the critical respect that it failed to meet its burden of proof on the score of establishing an "opening net worth" or total net value of the appellant's assets at the beginning of the sequence of tax years for which a deficiency was alleged.

On review of the record we are of the opinion

that the appellant's contention is without merit and that there was ample basis for the jury's verdict. Other points presented by appellant with respect to alleged errors at the trial do not merit discussion.

For the reasons stated the judgment of sentence of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix C—

Judgment of the Court of Appeals Sought to be Reviewed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ----- DISTRICT OF NEW JERSEY

Present: Kalodner and Hastie, Circuit Judges, and Wright, District Judge.

Judgment

This cause came on to be heard on the record from the United States District Court for the ----- District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 14, 1965, be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF
Clerk

June 13, 1966